

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MICHAEL SAVETSKY, individually and)	Case No. 14-03514 SC
on behalf of all others similarly)	
situated,)	ORDER DENYING MOTION FOR
)	LEAVE TO FILE MOTION FOR
Plaintiff,)	<u>RECONSIDERATION</u>
)	
v.)	
)	
PRE-PAID LEGAL SERVICES, INC.)	
d/b/a LegalShield,)	
)	
Defendant.)	
)	
)	
)	
)	

I. INTRODUCTION

Now before the Court is Defendant LegalShield's¹ motion for reconsideration of the Court's order denying Defendant's motion to compel arbitration in this putative consumer class action. ECF No. 33 ("Order"), 34 ("Mot."). While LegalShield brings its motion under Federal Rule of Civil Procedure 60(b), as discussed below the motion is properly considered under Civil Local Rule 7-9, which

¹ Defendant is actually named Pre-Paid Legal Services, Inc., but does business as LegalShield. For simplicity the Court will refer to Defendant as LegalShield.

1 requires parties to obtain leave from the Court to file a motion
2 for reconsideration. Thus the Court construes this as a motion for
3 leave to file motion for reconsideration. The Court found no
4 further submissions were necessary, and issued a clerk's notice
5 vacating the hearing date originally noticed with this motion
6 pursuant to Civil Local Rule 7-9(d). ECF No. 36 ("Clerk's
7 Notice"). For the reasons set forth below, leave to file a motion
8 for reconsideration is DENIED.

9
10 **II. BACKGROUND**

11 This is a putative class action alleging that LegalShield, a
12 company that provides pre-paid legal services, violated California
13 consumer laws by automatically charging recurring payments to
14 California consumers without sufficient consent or disclosure.

15 Named Plaintiff Michael Savetsky purchased a pre-paid legal
16 services plan on LegalShield's website. In Defendant's view, the
17 contract it formed with Savetsky requires he arbitrate his disputes
18 against LegalShield individually and in arbitration. Savetsky
19 disagrees, arguing he never agreed (or "assented") to arbitration.
20 The Court agreed with Savetsky and denied LegalShield's motion
21 under the Federal Arbitration Act, 9 U.S.C. Section 4, to compel
22 Savetsky to arbitrate. In doing so, the Court concluded that
23 because Savetsky never manifested assent to the arbitration
24 agreement either online (by simply purchasing the LegalShield
25 subscription) or later on (after receiving a mailed copy of
26 LegalShield's membership contract), he is not bound to its terms.

27 Now LegalShield asks the Court to reconsider that decision,
28 arguing that the Court did not consider relevant contract language

1 and, regardless of that language, newly uncovered facts show that
2 Savetsky did agree to arbitrate.

3
4 **III. LEGAL STANDARD**

5 As a preliminary matter, LegalShield argues that this motion
6 is governed by Rule 60(b) because, unlike Civil Local Rule 7-9
7 (which only applies to "interlocutory, non-appealable orders") Rule
8 60(b) applies to motions seeking "relief from final, appealable
9 orders." Mot. at 1, 7. Because LegalShield may (and has, ECF No.
10 35 ("Notice of Appeal")) appeal as of right from the Court's order
11 denying its motion to compel arbitration, LegalShield concludes the
12 Court's order cannot have been interlocutory. See 9 U.S.C. § 16
13 (permitting appeals from orders "denying a petition under section 5
14 of this title to order arbitration to proceed").

15 This argument rests on the erroneous premise that if an order
16 is appealable as of right it cannot be an interlocutory order. Yet
17 an interlocutory order is simply any order that does not dispose of
18 a case, without regard to whether that order is appealable as of
19 right. See Black's Law Dictionary 1130 (8th ed. 2004). Indeed,
20 "by . . . statute, most jurisdictions allow some types of
21 interlocutory orders . . . to be immediately appealed." Id. As a
22 result, the fact that an order may be appealed is not enough,
23 standing alone to render it a final (rather than interlocutory)
24 order, outside the scope of Civil Local Rule 7-9. See Bencharsky
25 v. Cottman Transmission Sys., LLC, No. C 08-03402 SI, 2009 WL
26 330353, at *1 n.1 (N.D. Cal. Feb. 10, 2009) (citing Wright &
27 Miller, Fed. Prac. & Proc. § 2651 n.6 (listing appealable
28 interlocutory orders)) (finding that while an order compelling

1 arbitration is appealable, "[i]t does not necessary follow,
2 however, that an order compelling arbitration is not also an
3 interlocutory order" covered by Civil Local Rule 7-9).

4 Moreover, "an order granting or denying a motion to compel
5 arbitration is a final decision only if such an order was the full
6 relief the parties sought." Alcoa v. Beazer, 124 F.3d 551, 562 (3d
7 Cir. 1997). Here, the Court's order denying the motion to compel
8 arbitration is clearly ancillary to Mr. Savetsky's California
9 consumer law allegations against LegalShield. Because Rule 60(b)
10 plainly only applies to final judgments or orders, a Rule 60(b)
11 motion is clearly improper. See Fed. R. Civ. P. 60(b) (allowing a
12 the Court to "[o]n motion and just terms," "relieve a party . . .
13 from a final judgment, order, or proceeding") (emphasis added); see
14 also Santamarina v. Sears, Roebuck & Co., 466 F.3d 570, 571 (7th
15 Cir. 2006) (Posner, J.) ("[Rule 60(b)], by its terms limited to
16 'final' judgments or orders, is inapplicable to interlocutory
17 orders."); Prudential Real Estate Affiliates, Inc. v. PPR Realty,
18 Inc., 204 F.3d 867, 880 (9th Cir. 2000).

19 As a result, LegalShield's motion is DENIED to the extent it
20 relies on Rule 60(b). Instead, the Court's authority to reconsider
21 or modify its order denying LegalShield's motion to compel
22 arbitration rests on its inherent, discretionary power to
23 reconsider or modify its interlocutory orders. See City of Los
24 Angeles, Harbor Div. v. Santa Monica Baykeeper, 254 F.3d 882, 885
25 (9th Cir. 2001) (quotation omitted) ("As long as a district court
26 has jurisdiction² over the case, then it possesses the inherent

27 ² Because the appeal of an order denying a motion to compel
28 arbitration is the appeal of an interlocutory order, the Court
retains jurisdiction to reconsider its previous orders and issue

1 procedural power to reconsider, rescind, or modify an interlocutory
2 order for cause seen by it to be sufficient.").

3 Civil Local Rule 7-9 lays out a procedure by which a party
4 may, after obtaining leave of the court, file a motion for
5 reconsideration of an interlocutory order. Under that Rule, the
6 moving party must "specifically show reasonable diligence in
7 bringing the motion," as well as one of the following:

8 (1) That at the time of the motion for leave, a
9 material difference in fact or law exists from
10 that which was presented to the Court before
11 entry of the interlocutory order for which
12 reconsideration is sought. The party also must
13 show that in the exercise of reasonable
14 diligence the party applying for
15 reconsideration did not know such fact or law
16 at the time of the interlocutory order; or

17 (2) The emergence of new material facts or a
18 change of law occurring after the time of such
19 order; or

20 (3) A manifest failure by the Court to consider
21 material facts or dispositive legal arguments
22 which were presented to the Court before such
23 interlocutory order.

24 Civ. L.R. 7-9(b)(1)-(3). Furthermore, "[n]o motion for leave to
25 file a motion for reconsideration may repeat any oral or written
26 argument made by the applying party in support of or in opposition
27 to the interlocutory order which the party now seeks to have
28 reconsidered." Id. at (c). "Whether or not to grant
reconsideration is committed to the sound discretion of the court."
Navajo Nation v. Confederated Tribes & Bands of the Yakama Indian
Nation, 331 F.3d 1041, 1046 (9th Cir. 2003).

subsequent orders. See Britton v. Co-op Banking Grp., 916 F.2d
1405, 1411-12 (9th Cir. 1990).

1 **IV. DISCUSSION**

2 LegalShield's motion presses two points. First, it argues
3 that the Court overlooked certain language in LegalShield's
4 membership contract (which was presented to the Court in the prior
5 motion), and as a result mistakenly concluded that "a reasonable
6 consumer reading the membership contract would have no way of
7 knowing that failing to cancel his membership could be construed as
8 assent to arbitrate all disputes with LegalShield." Order at 13.
9 Second, it contends that newly discovered evidence shows that
10 Savetsky had actual and inquiry notice of the membership contract's
11 terms and questions whether Savetsky misled the Court in his
12 declaration "in which he implies that he did not know a contract
13 existed" Mot. at 2.

14 The Court will address these points in order.

15 **A. Assent and Contract Formation**

16 First, LegalShield points out that the membership contract
17 states in its first line that "[i]n consideration of your payment
18 of the membership fee and your abiding by the terms and conditions
19 of this contract and any attached endorsements, you will receive
20 the herein contained benefits." ECF No. 18-1 ("Pinson Decl.") Ex.
21 C ("Membership Contract") at 2. LegalShield contends that this
22 language, coupled with the right (appearing six pages later in the
23 contract) of members to cancel their membership with LegalShield,
24 is "analytically indistinguishable from that in Carnival Cruise
25 Lines, Inc. v. Shute, 499 U.S. 585, 587 (1991) in which ticket
26 purchasers were told that acceptance of the ticket would be
27 considered acceptance 'of all of [its] terms and conditions.'"
28 Mot. at 10.

1 In the prior order, the Court considered and rejected the
2 argument that Savetsky's acceptance of the terms in the membership
3 contract could be "'inferred from inaction in the face of a duty to
4 act . . . and from retention of the benefit offered'"
5 Order at 13 (quoting Golden Eagle Ins. Co. v. Foremost Ins. Co., 20
6 Cal. App. 4th 1372, 1385-86 (Cal. Ct. App. 1993) (citations
7 omitted). As the Court previously stated, "nothing in the
8 membership contract indicated that inaction by Savetsky would
9 constitute assent to the terms of the contract." Id. In so doing,
10 the Court rejected precisely this argument, albeit without citation
11 to the specific contract language to which LegalShield now points.
12 Given that LegalShield did not point to this language in its
13 earlier motion, and the Court categorically rejected the argument
14 that the terms of the membership contract communicated that
15 Savetsky could assent to terms by failing to cancel the agreement,
16 this does not constitute a "manifest failure by the Court to
17 consider material facts or dispositive legal arguments." Civ. L.R.
18 7-9(b)(2). As a result, LegalShield's motion for leave to file a
19 motion for reconsideration on this point is DENIED.

20 Moreover, even if the Court were to grant leave to file a
21 motion for reconsideration on this issue, LegalShield's arguments
22 are unavailing. This contract language simply does not "make clear
23 to a reasonable consumer both that terms are being presented and
24 that they can be adopted through the conduct that the offeror
25 alleges constitutes assent." Schnabel v. Trilegiant Corp., 697
26 F.3d 110, 123 (2d Cir. 2012) (internal quotation marks and
27 alterations omitted); see also DeFontes v. Dell, Inc., 984 A.2d
28 1061, 1071 (R.I. 2009) ("This language certainly informed

1 plaintiffs that defendants intended to bind them to heretofore
2 undisclosed terms and conditions, but it did not advise them of the
3 period beyond which they will have indicated their assent to those
4 terms."). As a result, even if the Court were to consider this
5 argument it would not change the Court's conclusion.

6 Similarly, LegalShield's arguments about actual or inquiry
7 notice are simply improper attempts to relitigate the motion to
8 compel arbitration. The Court rejected the argument that Savetsky
9 had actual or inquiry notice of the membership contract based on
10 LegalShield's contracting process. LegalShield's new arguments
11 were not presented to the Court on the prior motion to compel
12 arbitration, and thus the Court could not have "manifest[ly]
13 fail[ed] . . . to consider" them. See Civ. L.R. 7-9(b)(3)
14 (requiring a manifest failure to consider legal arguments "which
15 were presented to the Court before" its prior order); see also In
16 re Cathode Ray Tube (CRT) Antitrust Litig., No. 07-cv-5944, 2014 WL
17 4446294, at *6 (N.D. Cal. Sept. 8, 2014) (declining to consider
18 factual arguments not presented at the time of the earlier order).
19 Thus, LegalShield's motion for leave to file a motion for
20 reconsideration on this point is also DENIED.

21 **B. New Evidence**

22 Finally, LegalShield argues that newly-discovered evidence
23 shows (1) that Savetsky's declaration was "misleading," and "gave
24 the Court a false picture of Plaintiff's actual or inquiry notice
25 about his contracts . . . ," and (2) that Savetsky further assented
26 to the contract by seeking to maintain his pre-paid legal services
27 subscription through LegalShield even after filing suit. Mot. at
28 2.

1 When seeking reconsideration based on newly-discovered facts
2 that "material[ly] differ[] . . . from that which was presented to
3 the Court before entry of the" prior order, the party seeking
4 reconsideration must show that "in the exercise of reasonable
5 diligence the party applying for reconsideration did not know such
6 fact[s] . . . at the time of the" prior order. Civ. L.R. 7-
7 9(b)(1). LegalShield makes no attempt to show "reasonable
8 diligence" in its submissions aside from conclusorily stating the
9 standard is satisfied. Mot. at 1 ("LegalShield has exercised
10 'reasonable diligence' in bringing this Motion"). Because
11 LegalShield has not carried its burden of showing that in the
12 exercise of reasonable diligence it did not know of these facts at
13 the time of the prior order, the motion is DENIED.

14 Nonetheless, the Court pauses to address LegalShield's
15 accusation that Savetsky misled or presented a false picture to the
16 Court in his prior declaration. After reviewing Savetsky's
17 declaration the Court finds no support for LegalShield's conclusion
18 that the declaration was false or misleading. ECF 24-1 ("Savetsky
19 Decl."). On the contrary, the two paragraphs LegalShield points
20 to, paragraphs 11 and 16, are perfectly consistent with
21 LegalShield's subsequent discoveries (1) that Savetsky sent
22 LegalShield an email months after the subscription process
23 described in his declaration asking for "a copy of the contracts I
24 signed" or (2) because of the process of entering into a different
25 agreement (containing an arbitration clause) with LegalShield,
26 Savetsky knew about the membership contract and its terms. On the
27 contrary, paragraph 11 describes Savetsky's enrollment process, and
28 paragraph 16 describes his receipt of a membership booklet "the

1 last 10 pages of which were a legal services contract" and states
2 that he did not read or retain the documents. Id. at ¶¶ 11, 16.
3 Neither of these statements appears to be untrue or even misleading
4 in light of the other facts LegalShield has discovered, because
5 Savetsky's declaration simply describes the process by which
6 Savetsky purchased his LegalShield membership without discussing
7 the previous contract he signed with LegalShield or his after the
8 fact email. The Court reminds the parties that it takes
9 accusations of fraud or misleading the Court, particularly in
10 declarations signed under penalty of perjury, very seriously. In
11 the future, counsel should refrain from making such insinuations
12 when they lack a basis in fact.

13
14 **V. CONCLUSION**

15 For the reasons set forth above, the motion for leave to file
16 a motion for reconsideration is DENIED.

17
18 IT IS SO ORDERED.

19
20 Dated: April 3, 2015


UNITED STATES DISTRICT JUDGE